SMALL NUMBERS, BIG PROBLEMS, BLACK MEN,¹ AND THE SUPREME COURT: A REFORM PROGRAM FOR TITLE VII AFTER HICKS

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INTRODUCTION

The United States has many recent immigrants. Today, as in the past, immigrants tend to cluster in their own communities, united by ties of language, culture, and background. Often immigrants form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses—grocery stores, furniture stores, clothing stores, cleaning services, restaurants, and gas stations—have been, and continue to be for many immigrant groups, the first rung on the ladder of American success. Derided as clannish and often resented for their ambition and hard work, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick recent immigrants off the ladder of success by compelling them to institute costly systems of hiring.

There is an equal danger to small black-run businesses in our central cities that the very antidiscrimination laws that were implemented to aid minorities may in fact hurt them. Must such businesses

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1. The object of this conference is black men. I applaud the efforts of all people to deal with the question of the intersection of race and gender. Looking at how gender is racialized and how race is genderized is an important part of that process. I do want to express one caveat—I do not intend to suggest that there are not important concerns involving black women. Traditionally many people have talked only about gender with respect to women and race, and I hope this conference and my paper are small steps along the important road to a better understanding.
undertake costly measures to recruit non-black employees in the name of nondiscrimination?²

This article will examine a twofold problem created by our complicated antidiscrimination jurisprudence. The first problem is that proof of discrimination is difficult in a number of situations even when it is significant and palpable.³ The second problem is the small but significant costs associated with cases that are imprudently brought.⁴ These two different concerns have been referred to as Type I and Type II errors.⁵ Type I errors are false positives, and occur when a test incorrectly brands someone as having not committed discrimination when they in fact have been discriminatory.⁶ Type II errors are false

³. The evidence on the existence of discrimination through testing supports the fact that discrimination exists, and individuals hired to collect evidence of discrimination testing are ways of measuring that discrimination. See Steven G. Anderson, Comment, Tester Standing Under Title VII: A Rose by Any Other Name, 41 DEPAUL L. REV. 1217 (1992); Jerome M. Culp & Bruce H. Dunson, Brothers of a Different Color: A Preliminary Look at Employer Treatment of White and Black Youth, in BLACK YOUTH EMPLOYMENT CRISIS 233 (Richard B. Freeman & Harry Holzer eds., 1986).
⁴. I understand for someone who has suffered discrimination there is never an imprudent case, but by imprudent I mean those cases brought by people to harass employers or by chronic malcontents that are not based upon "real" discrimination. I understand that to use a term like "real discrimination" runs the risk of falling prey to the conservative trap of allowing the perceptions of employers to decide whether a person affected by the act has been harmed. I understand that it is difficult to distinguish between persons who are driven crazy by the actions of discriminatory employers and persons who are crazy before they were ever employed. However, I think it is important to acknowledge that both kinds of individuals exist. I believe, from my own experience, that the number of people who are claiming discrimination when there has been none is smaller than many employers acknowledge, but that does not mean that all claims of discrimination are valid.
⁵. See also Richard Epstein, FORBIDDEN GROUNDS 222-25, 231, 377-81 (1991). Professor Epstein argues that the courts have been too concerned with what I call Type I error (what he calls Type II). For Epstein, what I term Type II errors are always more important, because they impact existing property rights, but this ignores employees' property rights. In some sense, Epstein's argument is a nineteenth century view of the work place, where all of the power belongs with the employer.
⁶. Type I error is the more critical error. We construct the problems so that the favored hypothesis, what economists call the null hypothesis, will result in the appropriate situation. In this context many would disagree about what the null hypothesis ought to be. Many who support employers believe that the null hypothesis ought to be that employers do not discriminate. Nevertheless, I am going to advance the alternative theory that Title VII requires the finding that a defendant employer or union discriminated when an employee should have been hired or promoted. The null hypothesis is that covered (continued)
negatives, and occur when someone who is not discriminatory is judged incorrectly to have committed acts of discrimination. The proponents of ending racial equality in employment are primarily concerned about Type I errors. They believe that there are large numbers of employees, particularly black employees, who are denied employment unfairly, but cannot successfully win a Title VII suit. Employers and their defenders are primarily concerned about Type II errors. Employers are convinced that they are forced by antidiscrimination legislation to pay judgments to non-meritorious plaintiffs. Some of these employers oppose extending the scope of Title VII because of these fears.

The Supreme Court has been concerned about the problem of Type II errors in a number of recent cases. In particular, the problem of Type II error in disparate impact cases has haunted several of the justices in Watson v. Fort Worth Bank & Trust, Wards Cove Packing Co., Inc. v. Atonio, and Johnson v. Santa Clara County Transportation Agency. In employees should not be discriminated against in employment. See Edward Leamer, Specification Searches 93-94 (1978).

8. 490 U.S. 642 (1989). In Wards Cove Packing Co., Justice White stated the following:

Respondent will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."

Id. at 657 (citing Watson, 487 U.S. at 992).
9. 480 U.S. 616 (1987). See Justice Scalia’s dissent:

This Court’s prior interpretations of Title VII, especially the decision in Griggs v. Duke Power Co., subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer’s work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counter-rebuttal of a "prima facie case" consisting of no more than the showing that the employer’s selection process "selects those from the protected class at a significantly lesser rate than their counterparts." . . . [A]fter today’s decision the failure to engage in reverse discrimination is economic folly, and arguably a breach of duty to shareholders or (continued)
each of these cases, several justices questioned whether the legal rule being advocated would produce false negatives, thus causing employers to increase the number of racial minorities or women hired in order to avoid liability. For example, Justice O'Connor observed in Watson that hiring quotas and preferential treatment for minorities and women may become the only cost-effective means of avoiding liability in Type II cases. Justice O'Connor believed that Congress clearly expressed its intent under Title VII that employers should not modify normal and legitimate business practices just because minorities and women are underrepresented in the work force. Justice O'Connor feared that extending disparate impact analysis to subjective employment practices might result in such an improper modification of business practices.

taxpayers, wherever the cost of anticipated Title VII litigation exceeds the cost of hiring less capable (though still minimally capable workers.)

Id. at 676 (Scalia, J., dissenting) (citations omitted) (emphasis in original). Justice Scalia extends his concern for Type II errors to the cost of preventing them, which he points out includes the cost of litigating and avoiding such errors. Id. at 677.


12. Id.

13. Id. See Justice O'Connor's opinion:

Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress's clearly expressed intent, and it should not be the effect of our decision today. . . . [P]laintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Once the employment practice at issue has been identified, . . . plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. . . . [T]he high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential (continued)
The problem that Justice O'Connor identifies in disparate impact analysis is really a Type II error. It is the fear that an employer's apprehension regarding Type II errors will force it to implement a quota system. The Court might have thought that this reaction to these potential Type II errors had been anticipated by the Court in *Connecticut v. Teal.*\(^{14}\) In *Teal,* the Court concluded that an employer cannot use the bottom line, i.e., that the number of employees in the work force is consistent with the potential applicant pool,\(^{15}\) as a defense to a charge of disparate impact discrimination.\(^{16}\) Accordingly, if the Court will not allow the employer to defend its actions by pointing to the number of racial minorities in the applicant pool as a defense to Type I errors, one might think that the Court's concern about quotas and error would go away. The courts that have faced this problem, however, are not primarily concerned with Type I errors.\(^{17}\) In almost all of these cases the Court has been concerned that employers would be unfairly charged with discrimination or that they would choose quotas in order to avoid such Type II errors.\(^{18}\) The courts have not done a very good job of examining both types of errors simultaneously. Perhaps this is because courts have had a hard time creating a "loss function" that would allow them to try to


15. *Id.* at 442.

16. *Id.* at 456.

17. The one exception to that concern which has recently been articulated by a majority of the Court has been Justice O'Connor's conclusion in *Watson* that Type I errors would be too large if subjective and discretionary actions were not subject to disparate impact analysis. *Watson,* 487 U.S. at 989.

We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. . . . We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests.

18. In addition, a significant minority of the Court has concluded that the Court's approval of affirmative action provides a protective gloss for some actions that create Type II errors and not others, namely protecting the employer if he discriminates against white employees but not if he discriminates against black employees or women. Since the majority in favor of affirmative action has been adversely affected by the loss of Justices Marshall and Brennan and their replacement by Justices Souter and Thomas, it is unclear whether a current majority would indeed support affirmative action. This is true even if Justice Ginsburg is indeed a supporter of affirmative action.
measure the cost of both errors simultaneously and attempt to minimize them.\textsuperscript{19}

The 1991 Civil Rights Act was designed to come to terms with the fight over what economists call the loss function. The loss function would include a concern for both types of errors, but its inconsistencies and difficulty in measurement make the concept too time-consuming for legislators; therefore, it remains an important question with which to struggle. It is beyond the scope of this paper to examine this loss function with respect to all aspects of disparate impact analysis. I have raised some of these questions in another paper.\textsuperscript{20}

In this paper, I want to address the similar problems that arise in the \textit{disparate treatment} context. The Supreme Court has not effectively addressed the issue in its most recent pronouncement in \textit{St. Mary's Honor Center v. Hicks}.\textsuperscript{21} Indeed, the Court has again followed the path that it has blazed in its opinions in the disparate treatment area. The Court has been primarily concerned with minimizing Type II errors, but the cost in terms of Type I errors has been largely ignored.

This article has three parts. In Part I, I will describe the problems associated with the Court's approach to disparate treatment. In Part II, I will describe a model to analyze the problem. In Part III, I will propose a solution that will require some legislative ingenuity and political will on the part of the civil rights community as a whole.

\section*{I. \textbf{TYPE I AND TYPE II ERRORS AND DISPARATE TREATMENT: SMALL NUMBERS AND BLACK MEN}}

\textbf{A. The Nature of the Problem}

The Court's decision in \textit{St. Mary's Honor Center v. Hicks}, a case that found no discrimination against a black male discharged, despite a good employment record, has many unfortunate aspects to it, particularly for the topic at hand. As a number of commentators have noted, too many black men are associated with the criminal justice system, and more college aged black men are in prison, or on parole or probation, than are in college.\textsuperscript{22} The decision of the Supreme Court concerning the

\footnotesize{\textsuperscript{19} When economists do this they describe their efforts as trying to minimize the loss function which they form by putting costs on each type of error and trying to find the policy combination that minimizes the total.}

\footnotesize{\textsuperscript{20} See Jerome M. Culp, Jr., \textit{Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform}, \textit{45 Rutgers L. Rev.} 965 (1993).}

\footnotesize{\textsuperscript{21} 113 S. Ct. 2742 (1993).}

\footnotesize{\textsuperscript{22} Some people have suggested that as many as 50% of young black men may be (continued)
advancement of a black man in the criminal justice system seems a strange precursor of the future in which the only jobs available for black men will be as overseers for the largely black prisons that house most of the others. Hicks suggests that even in that environment black males should expect little advancement. In this sense, Hicks is the inglorious denouement of current social policies that have attempted to deal with discrimination by imprisoning aggressive young black men. These social policies wage a war on drugs, making black communities and black men the war's intended victims. In that sense this paper is too optimistic. In order for there to be real change in the advancement opportunities for young black men, we must alter a whole series of policies, including welfare, education, and employment. Even with respect to employment, the role for antidiscrimination policy is likely to be small. Nevertheless, small does not mean nonexistent. If we do not address our current problems with respect to antidiscrimination policy, we are likely to exacerbate these problems in the future. Reforming antidiscrimination policy is a small but integral part of an overall strategy for change.

I believe that two issues should dominate when considering avenues for change. Black men need to be encouraged to develop the appropriate skills for the labor market of the next century, and black men have to be given the opportunity to fail. A large part of the problem that faces the young black male is that he is not able to secure the requisite skills to compete in the job market. This situation becomes a chicken and egg problem for many black men who do not see how finishing the curriculum at a high school, where the quality of education is often poor, will help them learn job skills. We have to figure out ways of connecting schooling, performance, and jobs. This was a task that was established associated with the criminal justice system. A Maryland state commission on crime and the black male found that black men in Maryland live an average of five years less than white men, are seven times more likely to be murdered, and have twice the infant mortality rate of white men. Study Shows: Poor Self-Esteem Is the Root Cause of Problems Facing Some Black Men, L.A. SENTINEL, July 29, 1993, at A10. Black men in Maryland were found to be twice as likely to be jobless and to be high school dropouts. Id. In Maryland, 77% of all prison inmates are black, and they are overwhelmingly male; 23% of all black men under the age of 30 are under some form of supervision by the criminal justice system, compared to 6.2% of white men. Id. In Washington D.C., 15% of black males between the ages of 18 and 35 were in prison or jail, 21% were on probation or parole, 6% were awaiting or sought for trial, and 42% were under the control of the criminal justice system. Norval Morris, Race, Drugs and Imprisonment, CHI. TRIB., Mar. 30, 1993, at 13. Though drug use among blacks and whites is comparable, blacks are five times as likely to be incarcerated as whites. Id.
in the 1970s, but we have failed to accomplish it. I believe that we will not accomplish this task until young black men see that there are real opportunities out there for them, opportunities that are supported by effective antidiscrimination statutes. In addition, if change is going to come in the interim, employers have to be encouraged to take a chance on people who have not proven that they can do the job based upon existing criteria. Until we reach a state of equilibrium where the skills of the black and white community are exactly alike, we must have a strategy for the interim.

Black men have to be given a chance to fail. Having the right to fail may seem counterproductive, but black men cannot succeed without the opportunity for failure. I observe a similar reluctance among many firms who come to interview our students every year. They write to me or call me seeking young minority associates, but in general, they are unwilling to take a chance on all but the sure bet for success because they think that they and the black candidates will not be able to deal with failure. I would like to reform our antidiscrimination statutes to give employers an incentive to give black men a chance to succeed and occasionally fail.

It should be clear that these two goals for reform are antagonistic in exactly the way that current interpretations of Title VII are. The first reform calls for potentially decreasing Type I errors by reducing the difference between black and white men, and the second requires increasing Type II errors by increasing the base of people who can sue employers when things go wrong. I would hope that the long run impact of such a reform would be to create forces of income equality and justice so that there are fewer of both kinds of error. Nevertheless, it is possible that part of what I propose will by definition increase the errors in the system and, therefore, the cost of legal regulation to employers. We seem to be at an impossible conflict, but I hope to argue for a reform that will have the chance of decreasing Type I errors as well as the cost to the employer.

B. Hicks and Type I and Type II Errors

The Court's decision in St. Mary's Honor Center v. Hicks has heartened some employers who are concerned about Type II errors, and it has frightened others who are concerned about Type I errors. In Hicks, the Court concluded that an employee who proves a prima facie case of racial discrimination will not prevail, even if the employer's

articulated rationale is found to be without substance, whenever the fact finder concludes that some other rationale might have caused the loss of a job.\textsuperscript{24} The district court concluded that the discharge of a black male employee might have simply been "personal."\textsuperscript{25} The court does not tell us how the supervisor separated the personal from the racial. When the court says that it might have been personal, it suggests some raceless black person dealing with an equally raceless white supervisor. The employee has been magically transported into the fantasy world of color blindness and meritocracy. The driving force behind Justice Scalia's opinion in \textit{Hicks} is the almost mindless fear that the employer will have a Type II error imposed upon him. Justice Scalia writes:

Assume that 40\% of a business' work force are members of a particular minority group, a group which comprises only 10\% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under \textit{McDonnell Douglas}, the plaintiff has a prima facie case, see 411 U.S. at 802, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be incorrect, they must assess damages against the company, whether or not they believe the company was guilty of racial discrimination. The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence." Surely nothing short of inescapable prior holdings (the dissent does not pretend

\textsuperscript{24} \textit{Id.} at 2749, 2757, 2759.

\textsuperscript{25} \textit{Id.} at 2748.
Justice Scalia so clearly fears a Type II error being imposed on an employer that he makes assumptions about the ability of an employer to defend against charges of discrimination that are at best fanciful. How frequently are we going to find that a totally innocent employer has discharged a black supervisor at the same time that a potentially successful black subordinate is attempting to sue? It is not just the paucity of black supervisors that makes this vision unlikely. This view ignores the larger truth that many blacks are going to have to support the system, even with its racism, to get along. It can only be an overactive fear of Type II error that pushes Justice Scalia to make such a fanciful argument. This trepidation is not new, however. A number of courts have been coming to similar conclusions concerning the impact of a prima facie case and their unwillingness to find discrimination.

A recent decision of the Seventh Circuit highlights the problem. In *EEOC v. Consolidated Service Systems,* Judge Richard Posner concluded that a store owned by a Korean immigrant which hired only other Korean immigrants did not violate Title VII. The court found that the rationale for the ethnic exclusion was not a product of ethnic bias but was based upon nonracial economic concerns. Judge Posner also concluded that the district court's finding of nondiscrimination was supported by the record. Judge Posner concluded that it was possible for the employer to discriminate, but that he had not because it was cheaper for him to find workers in his own community. This conclusion will likely immunize an employer in any small labor market from being successfully sued for hiring discrimination. Almost any exclusion for race or gender can be given this kind of economic protection gloss. *Consolidated Service* is evidence that the *Hicks* decision is not the last word on the various rationales that courts or juries concerned about Type II errors can utilize. Fact finders in disparate treatment cases are likely to find that they can use a whole plethora of excuses—from the personal to the economic—that will insulate employers from liability. Factfinders need not adopt such a method, but if I read *Hicks* correctly, an employer is entitled to a broad jury instruction; if the jury does not believe that

26. *Id.* at 2750-51 (footnotes omitted).
27. 989 F.2d 233 (7th Cir. 1993).
28. *Id.* at 235.
29. *Id.* at 237.
discrimination was caused by racial or gender based animus, they may find that the employer has not discriminated. This is an invitation to those factfinders who are concerned about Type II errors to attempt to reduce them substantially by refusing to find discrimination. Unlike *Hicks*, the issue in *Consumer Service* is hiring and not firing someone. It is proportionately more difficult for an employer to come up with rationales for firing someone than it is to provide a reason for not promoting or not hiring someone initially. Of course that makes the Supreme Court's opinion in *Hicks* even more problematic.

The problem that *Hicks* exposes is the existing thin avenue for finding an employer guilty of discrimination, particularly racial discrimination, in a disparate treatment context. The real problem is that unless the employer is unintelligent or badly represented by counsel, she will have produced a paper trail that is difficult to defeat. What the Supreme Court should have focused on in *Hicks* is not whether there was a situation of personal animus (seldom do people get fired without personal animus); rather, the focus should have centered on why the employer could not give an alternative justification for the discharge of Melvin Hicks. Most competent counsel will advance more challenging arguments than the ones advanced here, but the *Hicks* decision suggests how little in the way of a defense (in *Hicks*, really nothing was that convincing) there has to be advanced for an employer to prevail when there is this fear of Type II error. *Hicks* and *Consumer Service* leave employers free to do almost anything they want in a disparate treatment case when the plaintiff cannot produce "direct" evidence of discrimination.

I should emphasize that my real concern with Justice Scalia's opinion in *Hicks*, and much of the jurisprudence on Title VII and other antidiscrimination legislation, is that there is no recognition that it is possible race may matter in some jobs and not others. Justice Scalia makes the mistake of seeing discrimination as a uni-dimensional concept that is unconcerned with the job or class of the person involved. An alternative means of analysis in the *Hicks* case is to examine how the intersections between race, gender, and class alter how jobs and people are constructed. It has often been true that people have been able to

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accept blacks in certain jobs and not others.\textsuperscript{31} It is the intersection of our class bias and how we see black men that makes the Hicks case so problematic and makes many of us fear that current interpretations of Title VII will not account for the Type I errors that may exist. These problems will be exacerbated if Judge Posner's view that employers can use the most economically efficient approach while searching for employees is allowed to prevail in a wider arena. Since the district court failed to consider the intersection of class bias and the perceptions about black men, the court's reasonings for concluding that the employer did not discriminate are unpersuasive. Justice Scalia noted that a number of rationale's caused the district court to come to this conclusion: "including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that 'the number of black employees at St. Mary's remained constant.'\textsuperscript{32}

The problem with these reasons is that they assume discrimination is a single thing that will not be influenced by the type of job or the gender of the person involved. In addition, Justice Scalia assumes that no black person will condone discrimination. Both of these suggestions are problematic. They both stem from a view of the relationship between race, class, and gender that fails to look at the complicated response of people. Particularly in the South, it has been the tradition that some jobs were black male or female jobs. Black women were, and still are, the maids for white people and black men acted as "bootblacks," yardmen, and janitors.\textsuperscript{33} These jobs are not just racialized; they have a significant gender component to them. The fact that the number of black employees at a firm does not change provides little evidence about whether a white supervisor might not like a black man in a significant position.

\textsuperscript{31} For an example from one of the earliest Title VII cases, see Slack v. Havens, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), aff'd as modified, 522 F.2d 1091 (9th Cir. 1975) (involving the transfer of a white woman from a unit where black women were told to do cleaning and other difficult and unpleasant tasks). Slack raises questions about the intersection of gender and race from the women's side of this question.

\textsuperscript{32} 113 S. Ct. at 2748 n.3.

\textsuperscript{33} This segregation was not, and is not, just limited to the South. Many northern industries have substantial job segregation. After my first year in college I worked in a steel mill where almost all the black men worked either in the grinding part of the mill—performing the difficult but low paying job of grinding the top layer off of steel plates—or as part of the cleaning and janitorial service. This kind of job segregation is not unusual.
In many industries, it is not that black people cannot perform any job; rather, discrimination often arises when blacks are said to be unqualified for jobs that are seen to be outside their racial and gender category. For example, even today many law firms have a difficult time seeing black people as lawyers, senior associates, or partners. Each of those positions produce different hurdles, and as one moves up the ladder, higher hurdles exist which have both a racial and gender component. To assume that unguided personal bias was the cause of the white supervisor's animus is to assume that race in general can be taken out of the analysis. This does not mean that every discharge of a black person is a product of racial bias, but it does mean that when the employer has not articulated any defense that anyone would find credible, it is unlikely that racial bias has been completely ruled out by the factfinder. It is precisely the fear that issues would be unexamined that caused the Supreme Court to adopt the disparate treatment analysis in the first place. The court's fear in *McDonald Douglas* was of Type I errors, but Justice Scalia has turned those fears into a concern almost exclusively with Type II errors.

Both Justice Scalia and Judge Posner possess a view concerning reform which assumes people will be able to advance up the economic ladder by relying on themselves and their communities' resources. Nevertheless, it is possible that when Congress passed Title VII they thought more resources were involved. Certainly other aspects of antidiscrimination policy, including federal contract compliance, are intended to alter the existing resources available to the communities of racial minorities, particularly black communities. Judge Posner suggests that there is a window for blacks to use the same methods of community and individual resources to advance themselves. If there are systematic reasons why blacks are less likely to fulfill the role of shopkeeper or small business person, then the assumption that such an interpretation will help black employment is likely to be unsuccessful. It is exactly

35. It is not possible for a judge to understand our complicated history of discrimination and the efforts to reform that past and present discrimination without having a view about discrimination. The problem is that too much of the current policy endorsed by a majority on the Supreme Court is a product of a simplistic and unrealistic view of change.
37. See William Darity, Jr. & Rhonda Williams, *Peddlers Forever? Culture, Competition, and Discrimination*, 75 AM. ECON. REV. 256 (1985); see also William (continued)
this assumption of similar constraints and changes that permits Judge Posner to argue for a view of Title VII that does not shed light on Type I errors.

In this interpretation, he simply anticipates what a majority on the current Court have recently decided. This interpretation of Title VII need not be permanent, but as Professor Spann has suggested, we are unlikely to be freed by interpretations of the Court. If economic and social freedom are to occur, those interested in reaching these goals will have to create the political force for re-creating a legal regime that will help us accomplish this end. As I have suggested elsewhere, even that may not be enough if judges are appointed who are indifferent to reducing Type I errors. The question for those of us interested in civil rights is how to reduce the Type I errors without creating a political reaction due to the fear of Type II errors that will frustrate the elimination of discrimination. I think the answer requires, if not drastic change, at least important change in how courts, the civil rights community, and Congress look at the problem. We have to alter the current system if we are going to fully utilize the regulatory aspects of Title VII.


40. Derrick Bell has raised important questions about whether any regulation of the system can be successful in eliminating the taint of racism. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 47-64 (1992). Professor Bell argues that we should simply license the right to discriminate. Id. Such a system might create greater amounts of income and more change than the current system. The point of Professor Bell's important critique is that because of other assumptions it is difficult to get to discrimination. Id. I hope that this paper understands Professor Bell's point and, while not completely agreeing with it, permits us to move on.
II. AN ECONOMIC MODEL OF ENFORCEMENT OF TITLE VII

Courts have a great deal of political leeway in determining the contours of Title VII’s regulation of the employment process, but that interpretation takes place as a part of an economic and political process. The chief service of economics to understanding this problem is in describing the constraints that exist for policy decisions. Nevertheless, in attempting to learn from these constraints, judges and commentators have not appropriately created a model for change that considers the political setting in which they work. This section tries to improve our knowledge in that way, but it is, by definition, only a partial model. I mean only to sketch out the important political and economic constraints that operate together to create a jurisprudence of Title VII.

One way to view the effects of Title VII is to think of it as a kind of sanction that affects the number of black employees hired. Title VII imposes a sanction on employers who fail to hire minority workers. The sanction can be thought of as an implicit incentive at the sanction point to be at a particular level of precaution. In essence, Title VII

41. But see ROBERTO M. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK (1987) (arguing that it is possible to think of a world in which marginalism is rejected, and in which the object of society is conceived to be altering the basic deep structure).

42. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1988), forbids discrimination on the basis of race, color, sex, national origin, or religion in the terms and conditions of employment. It applies to everyone, including white males. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286 (1976). But the most important efforts in Title VII have involved issues of racial and sexual inequality. National origin and religion have been involved in the enforcement efforts by the EEOC and private defendants to a much lesser extent.

43. Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984). Cooter argues that it is possible to determine when courts ought to adopt a sanction system and when they ought to adopt a price system. He concludes that (a) a sanction system ought to be adopted when the best observers of both social costs and benefits are government officials, but (b) a price system ought to be adopted when there is an asymmetry of information, that is, when government officials are the best observers of social costs and private persons are the best observer of social benefits. Id. at 1535-38. If that is the right framework, then one can argue for either a price or a sanction system. Certainly, it can be contended that government can best measure the social costs of discrimination and private individuals can best measure the benefits associated with the hiring of black workers. The problem with this contention is the same problem that plagues Cooter’s analysis: there are no clear ways of distinguishing between social costs and social benefits in these examples. This means that we need some other way of determining when we ought to choose between prices and sanctions. One way of doing this is to ask the more specific question of whether private or governmental entities will define where society ought to be more fair than private persons. Sanctions provide opportunities for governmental
requires employers to either have a certain percentage of black workers who are paid the same wage as white workers performing the same job or be assessed a penalty measured in terms of back pay and other lost wages and perhaps future affirmative action requirements. The penalty will be equal to the cost of wages and benefits lost by workers who have not been paid equally. The operation of Title VII as a sanction is shown in Figure 1.\textsuperscript{44} Certain costs of enforcement are imposed on the employer when he hires black workers. These costs include the higher cost of finding black workers when the cost of hiring white workers to perform the tasks for which black workers were hired would be lower.\textsuperscript{45}

The employer's choice is shown in Figure 1 by the crossed lines. The diagram measures the amount of precaution engaged in by employers in terms of the percentage of the labor force that is black.\textsuperscript{46} The greater the amount of blacks, the harder it will be for a successful disparate treatment case to be made, and it is clear that the courts look to the bottom line of numbers in disparate treatment cases.\textsuperscript{47} The more precaution an employer takes in terms of the percentage of blacks hired the lower the expected litigation costs, indicated in Figure 1 as L. The employer is going to try to minimize the cost of doing business by taking account of both the potential litigation costs and the costs of hiring workers. Accordingly, the rational and efficient employer is going to try

entities to say that something is inherently wrong and not fungible. To me, Title VII is the kind of legislation that has been altered by federal judges into something that is much less concerned with justice and much more concerned with minimizing the costs imposed in a price system on employers for not hiring black individuals.

\textsuperscript{44} See infra p. 264.

\textsuperscript{45} It is possible that in fact these costs are negligible or that black workers could be cheaper than white workers, but the possibility of noncooperation between white and black workers probably helps to explain the existence of some real costs even if black workers are as or more productive as whites. See Assar Lindbeck & Dennis J. Snower, Cooperation, Harassment, and Involuntary Unemployment: An Insider-Outsider Approach, 78 AM. ECON. REV. 167 (1988) (stating that incumbent workers, even nondiscriminatory incumbent workers, have an incentive to refuse to work with those including racial minorities and women who would offer to work at below-existing market levels). Traditional economic models that describe potential resistance to black workers by incumbent white workers for "irrational" reasons also could explain why these costs are higher. See generally GARY BECKER, THE ECONOMICS OF DISCRIMINATION (1958).

\textsuperscript{46} A long line of Title VII cases makes it clear that Title VII protects everyone, but that does not mean that the discrimination that people thought they were addressing was primarily against African-Americans and other racial groups and women.

\textsuperscript{47} This is true even though the Court rejected the bottom line defense in Connecticut v. Teal, 457 U.S. 440 (1982), for disparate impact cases. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).
to be at the minimum point of the Total Cost Curve (TC). However, one of the things that antidiscrimination policy attempts to do is to tell employers that if they meet the appropriate standards, they will not be responsible for paying discrimination claims.

As Figure 1 indicates, it is clear that the profit maximizing employer wants to be at point P*, the point below which the effective sanction of Title VII is triggered. The employer who is below point P* faces the prospect that he will be successfully accused of being a discriminator. The employer who cares only about maximizing his profits will remain at P*, but some employers may choose to be at some point greater in percentage than P*. In that case, they either are acting altruistically, or they believe that in the long run profits will be maximized by such a policy. In the example given in Figure 1, the level of costs (C) will depend on the actions of other employers. If other employers hire more blacks, then the effective labor supply will go down and the costs will go up, shifting C to the left. In that case, P* may also be shifted by the courts as they define discrimination.

Where the court places the sanction trigger is the most important factor in determining the impact of Title VII on black incomes. Since Title VII determinations generally result from judicial decisions, it is

48. Before the 1991 Civil Rights Act, 42 U.S.C.A. § 1975 (Supp. IV 1993), Title VII was seen as an equitable remedy, thus jury trials were not required. Shah v. Mt. Zion Hosp. & Medical Ctr., 642 F.2d 268 (9th Cir. 1981). Further, while some courts impanel advisory juries, judges can and often do ignore their decisions. Federal judges have considerable discretion in deciding the facts in a case, and the level of review by appellate courts is extremely narrow. See Anderson v. Bessemer City, 470 U.S. 564, 573-75 (1985).

If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous . . . . When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said . . . . [W]hen a trial judge’s finding is based on his decision to credit the testimony . . . that finding, if not internally inconsistent, can virtually never be clear error.

Id. (emphasis added); see also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). The 1991 Civil Rights Act provides that if a complaining party (continued)
district court judges and juries who will determine where P* ought to be placed. It has been argued that a change has occurred in how vigorously the Supreme Court has enforced Title VII,49 and a similar argument can be made that changes have occurred in how the district courts have interpreted Title VII. These changes have shifted P* to the left. P* is determined by decisions of the changing roster of federal district and appellate judges and now by the questions that will be presented to juries. It should not be surprising that interpretations of Title VII change as the political composition of federal judges changes.50 The impact of federal judges on the placement of the sanction point for Title VII becomes even more important if we consider that judges may be somewhat uncertain about where P* ought to be placed.51

This fact leads judges to declare indirectly that employers need to be at P* in Figure 2,52 when in fact the points at which courts are penalizing for noncompliance range from P** to P", and employers are choosing to be at P". This occurs because courts are uncertain about the consequences


49. See generally Culp & Dunson, supra note 3.

50. The most significant difference between Reagan appointees to the federal bench and other Republican appointees was their views on civil rights. In addition, the largest difference between Republican and Democratic appointments to the federal bench are over civil rights. See Timothy B. Tomasi & Jess A. Velona, Note, All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals, 87 COLUM. L. REV. 766 (1987). To understand the political nature of the courts, it is sufficient to note that the most frequent use of Rule 11 sanctions is in antidiscrimination cases. See, e.g., Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 HARV. L. REV. 630, 631 & n.7 (1987) (citing Mary S. Henifin, A Preliminary Analysis of Reported Decisions Applying the 1983 Amendments to Rules 11, 16 and 26 of the Federal Rules of Civil Procedure 16 (Aug. 28, 1984) (unpublished manuscript, on file with the Fordham Law Review); and Saul M. Kassin, An Empirical Study of Rule 11 Sanctions 38 (1985) (stating that judges who more frequently imposed sanctions tended to impose them in a greater proportion of civil rights cases than did judges who generally used Rule 11 less vigorously).

51. Another way of looking at this problem is to assume that judges differ in where they believe P* ought to be. If this is true, then the uncertainty reflected here is due to the spectrum of views among those district or appellate judges who hear the cases in question.

Some will contend that if judges are setting P*, they should do it as a legal question and not a factual issue. But it is more difficult than we like to admit to separate the facts from the law. A fair reading of some of the Supreme Court's recent decisions suggests that the Court is likely to treat this issue, at least, as a significantly factual one for the district judge to decide. Anderson v. Bessemer City, 470 U.S. 564 (1985).

52. See infra p. 265.
of imposing strict rules on employers and thus permit exceptions that tend to undercut where the real sanction point is set. Therefore, the key to measuring the impact on Title VII is to find the location of $P^*$, $P^{**}$, and $P^\prime$. If they are at different places, as in Figure 2, the court will be "advertising" one sanction while actually creating a different and less effective one. Similar problems of uncertainty are created if employers have difficulty figuring out where the court is placing the sanction point. Indeed, it is impossible, without more information, to predict where the employer will end up in such uncertain settings.

Some commentators, and some members of the Supreme Court, examining this problem have worried only about how high the total social cost curve is in these diagrams. Nevertheless, these models take as given the courts' location of $P^*$, that is, the point at which the sanction is imposed. We hypothesize this as being a problem with the two types of error that exist. The justices that have worried about whether quotas are set, i.e., whether $P^*$ is a fixed and certain point, have primarily been concerned with the size of the costs associated with liability in this system and the increased costs associated with trying to reach a particular sanction point. This concern seems misplaced if Title VII ought to be concerned with the number of blacks hired as well as procedural fairness. In addition, the Supreme Court, in discussing this question, has not done a reasonable job of attempting to distinguish between the two kinds of costs that contribute to the TC curve being high for employers.53

If I am right that in order to improve the condition of black men, employers are required to alter their policies, we are likely to increase the costs to employers of Title VII. In particular, if we do not change current policy, we will have a situation where we would expect litigation costs to go up as the employer increases the hiring of black workers. Costs to employers will rise because employers will be taking more chances in hiring, and more employees will fail. Some critics are going to attribute that failure to discrimination, and employers are going to have to pay lawyers to defend those cases. The question we currently face is how to reduce those costs without eliminating the sanction quality of Title VII. We need to figure out how to increase the demand for black

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53. This has to be why Justices O'Connor and Rehnquist dissented from the decision of the Court in Connecticut v. Teal, 457 U.S. 440, 456 (1982) (Powell, J., dissenting). They are saying that they would like to permit employers to be able to use the hiring of blacks as an effective defense, but they would object to the requirement that employers had to hire a certain percentage of blacks. See id. at 463-64.
labor without creating a counterforce in the business community against those changes.

III. A MODEST REFORM PROPOSAL

I would like to suggest a reform proposal for Title VII that would take us away from the court-centered model which has dominated our thinking about antidiscrimination policy and would model Title VII and antidiscrimination policy on the National Labor Relations Act. I believe that three things ought to be accomplished with any reform proposal for antidiscrimination policy. We have discussed all three of them above. First, any reform program ought to adopt as its primary goal to increase the number of black men and women hired. This means having a program that gives employers the proper incentive to hire black workers and not to balance that hiring with litigation expenses. Any proposal that increases the demand just for lawyers will have only minimal impact on the economic position of black people as a whole. Second, any reform program has to create a possible political coalition that will support the change. In our system, the law is ultimately a product of the political system. Thus, any program that is not successful in creating its own political dynamics will fail in the long run. Third, the status quo must be changed. The current position of black people is deplorable, and the trends are to basically remain where we are or to move in the wrong direction. A majority on the current Supreme Court seem to believe that the status quo is all right and that part of their job is to help enforce the status quo. This assumption has to be altered in some way if effective change is to occur.

My proposal is simple, but its implementation is likely to be complicated. Even if some of you disagree with my precise reforms, I hope that it will spur you to think about the nature of our current situation and how it ought to altered. I believe that we are likely to accomplish all three of the goals I outlined above only if we are willing to give up something that is sometimes important. The critical task that remains for us is how to reduce Type I errors without creating a political coalition around the increase in Type II errors. The answer, I think, has to be in reducing some of the litigation and other costs associated with Title VII. We do not want to change the sanction point that employers face, but we do want to reduce the costs associated with getting employers to that point.

To illustrate this point, take two examples that emphasize the frustration that the current structure creates. In situation one, an employer does not want black men to progress past a certain job level. If
the employer uses complicated procedures that apply to a small number of job choices, the employers, decisions become practically unchallengeable. By practically, I mean that there will be little incentive for anyone to examine the situation and to attempt to force the employer to alter the hiring and retention policy. Current policy permits someone to investigate and spend large amounts of resources to attempt to prove discrimination, but the current policy makes it easy for a factfinder to insulate their decisions from review by appeals court judges. The Hicks and Consumer Service cases are perfect examples of this phenomena in the disparate treatment and disparate impact contexts. The district court's conclusion is affirmed by the Supreme Court or the court of appeals, without making sure that racial animus played no part in the decision.\textsuperscript{54}

It is very difficult for any black candidate to prove racial animus if a law school refuses to hire him or her. It would not matter if the candidate were first in his class at Harvard, Yale, or Chicago, and had clerked for a Supreme Court judge, had published five articles, and had a Ph.D. It is always possible for a careful employer to insulate their actions from the antidiscrimination scheme particularly when we are talking about hiring decisions. It is more difficult for an employer to insulate their actions when firing an employee. It is precisely for this reason that the Hicks case is a discharge case. Most employers do not discharge employees; so it is difficult, but not impossible, for the employer to create an appropriate record. The truth is that an employer who by accident does something wrong may be more likely to be found guilty of discrimination than the most careful bigot. For example, if an employer has employees with discriminatory attitudes who take discriminatory action against an otherwise dischargeable employee, the employer may find that there is a difficult case to win and thus pay damages. Such problems are likely to be exacerbated by the changes in the 1991 Civil Rights Act that permit jury trials for some antidiscrimination cases. This will mean that the courts will have to worry about juries finding some of the employees' tales about discrimination valid in cases when they are not. I am less convinced than

\textsuperscript{54}. This is less true of Posner's decision in Consumer Service. But the dicta in this case, when applied by less able judges, seems to invite an insulation of real discrimination from examination. I am not sure that other judges will be as careful as Judge Posner was in examining all of the potential options that are available. In addition, I wonder to what extent notions of racial inferiority of black men in the Korean community and in the majority culture make that insulation more likely.
employers that most of the payments they make are invalid.\textsuperscript{55} I do believe that part of the concern they feel is a product of the uncertainty created by the antidiscrimination system.

There are reforms that we can make in the antidiscrimination system that will deal with that uncertainty. First, we should revise \textit{Connecticut v. Teal} to make the bottom line a defense. This will allow employers to avoid the costs and the uncertainty of doing business by permitting employers to look for black men and women who fit the appropriate bill. Second, we should repeal the \textit{Hicks} decision with a bill that would require an employer to put their real reasons for their employment decisions forward or lose, and we should limit the ability of factfinders to create illusory rationales for nondiscrimination. This will encourage employers to deal with the antidiscrimination system and not fight it.

I would alter the Equal Employment Opportunity Commission so that it took on functions similar to the National Labor Relations Board. This would mean making the general counsel of the EEOC similar to the general counsel of the National Labor Relations Board in terms of responsibility for investigating and prosecuting claims before administrative law judges. I believe it may be easier to create a coalition for change to alter the status quo of black men by creating an administrative model because the costs to employers and the real cost of the Type II errors are lower. Finally, I think we should think about permitting more limited review from that process for claims that are relatively small.

Many of these proposed changes will seem to conflict with hard won victories, but all victories come with a price. The current system of antidiscrimination policy has advanced the economic interests of black men, but this is not enough. We need to improve the incentives we give to employers to deal with, hire, and promote black men and women. Our current system gives personnel managers an excuse not to do more. I believe that we ought to shift our focus toward an approach that will take away their excuses. What the civil rights community gives up is primarily a gold card system of redress that does not deliver the gold card services frequently enough to black men and women.

I know that some are going to believe that this paper makes too many concessions to the current political structure, and that it is ultimately too

\textsuperscript{55} Professor John J. Donohue has found that employers can insulate themselves from all of the costs of labor suits including antidiscrimination suits for $65 per employee per year. John J. Donohue, \textit{Is Title VII Efficient}, 134 U. PA. L. REV. 1411 (1986). But some will respond that in a global economy such costs are prohibitive.
pessimistic about the possibility of change. I do not mean to adopt such a passive view of America. I hope this paper has a touch of racial realism and a touch of concern about the need for change. It makes compromises, but I hope not to the most important fabric of Title VII—the movement for change.

CONCLUSION

What is the role and function of the law in contemporary progressive Politics? Are legal institutions crucial terrain on which significant social change can take place? The status quo lives and thrives on perennial radical dilemma of disbelief: it is hard for ordinary citizens to believe their actions can make a difference.

Much of our current antidiscrimination jurisprudence encourages the status quo. A status quo that is more than depressing for black men and women. They are left out of the economic and social fruits of our society, but it is difficult to see a path for change that will deal with the overwhelming nature of our current situation. The problem seems too large to believe that any minor change in any part of any system will make a difference in the ultimate situation of people at the bottom of society. I think that pessimism is not completely appropriate.

Changing the antidiscrimination system to make it more effective in providing alternatives for black men and women will not solve all of our problems, but it is part of a larger process of change that has to use the law not as a panacea, but as part of the creation of a new status quo for change. Law is a powerful instrument for conserving and distributing power. Our ultimate task is to figure out what are the appropriate changes that ought to occur to that system so that the status quo is part of a system for change. It is possible to identify the necessary changes and make them. Women have made important steps toward ending some of the gender oppression they feel in the workplace by building a coalition for change that includes the legal system. We who care about black men must do no less.

57. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993). In Harris, the Court determined that employees are subject to broad protection from abusive work environments, and they are not required to prove that they have suffered psychological injuries. Id.
only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

_Id._ This victory was a culmination of re-education of judges and the public. I do not believe if you had asked congresspersons in 1964 whether they intended to protect sexual harassment that they would have said yes.
REFORM PROGRAM FOR TITLE VII

Costs in Dollars

$C' = \text{The costs of hiring black workers}$

$TC = C' + L$

$C = \text{Cost curve found by employer under Title VII}$

$p^{**}$ $p^*$ $p''$

Percentage of the Labor force that is Black

$TC = \text{Total costs to society}$

$L = \text{Liability costs associated with levels of precaution}$

Figure 2